DEC 1 1952

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

In The Supreme Court Of The United States

No. 476

ROBERT GLENN JOHNSON, SR., L. P. JOHNSON, JAMES PARKS AND IKE WELBORN,
Petitioners

Vs.

UNITED STATES OF AMERICA,
Respondent

KYLE HAYES
Counsel for Petitioners
Hayes Building
North Wilkesboro, N. C.

Counsel on Brief for Petitioners:
CLYDE HAYES
EUGENE TRIVETTE
WM. G. MITCHELL
Northwestern Bank Building
North Wilkesboro, N. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	5
Specifications of Errors to Be Urged	5
Reasons for Granting the Writ	6
Conclusion	11

Table of Citations

Baxter v. United States, 188, Fed. 2nd 119	7
Brinegar v. United States, 338 U.S. 160	6
Carroll v. United States, 267 U.S. 132	6
Hart v. United States, 162 Fed. 2nd 74	6
Powell v. State of Alabama, 287 U. S. 45	10
United States v. Rabinowitz, 339 U.S. 56	6
United States v. Trupiano, 334 U.S. 699	7
United States v. Lefkowitz, 285 U.S. 452	7
United States v. Fleischman, 339 U.S. 349	10

Statutes

Title 26 USCA, Section 2803 (a)	4
Title 26 USCA, Section 2913	4, 5

In The
Supreme Court Of The United States

No.

ROBERT GLENN JOHNSON, SR., L. P. JOHNSON, JAMES PARKS AND IKE WELBORN,
Petitioners

Vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

The petitioners, Robert Glenn Johnson, Sr., L. P. Johnson, James Parks and Ike Welborn, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit upholding the conviction of the petitioners on a three count indictment charging them with violating Title 26 USC 2913 and 2803, to wit, the removal and concealment of distilled spirits in containers which did not have affixed thereto the required stamps. Robert Glenn Johnson, Sr. was charged in a separate

indictment in the District Court, which was No. 3836, and the other defendants were charged in No. 3835 with the same offenses. Both cases were consolidated for hearing in the Circuit Court of Appeals, having also been consolidated for trial in the District Court.

OPINION BELOW

The opinion of the Circuit Court of Appeals appears in the record.

JURISDICTION

The decision of the Circuit Court of Appeals, here sought to be reviewed, was originally determined on October 7, 1952. A petition for rehearing was timely filed, and was denied on the 1st day of November, 1952.

The jurisdiction of this court is invoked under 28 USC 1254th. See also rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1.

When it appears from the record that no entry of guilt had been made in the record in the District Court, and this was first discovered during the argument in the Circuit Court of Appeals, do counsel for the defendants have the authority to waive this entry in the absence of the defendants.

2.

Do Agents for the Alcohol and Tobacco Tax Division of the Internal Revenue, being accompanied by a Deputy Marshal to the curtilage, with a fugitive warrant, have the right to search a van type truck found sitting near the side of the public road and behind the smoke house of the owner of the curtilage when the agents had information that a truck of similar type was being used to transport nontax-paid distilled spirits in and around High Point and Greensboro, North Carolina, a distance of approximately 80 miles from the curtilage; the Deputy Marshal with the aid of the officers having searched the home and outbuildings and not having found the fugitive, said Marshal having testified that after he completed the search of the building "I stayed down to my car". Is such search lawful?

3.

The appellant, having advised the agent that if there was a truck out there he knew nothing of it and had no keys for it, is such evidence sufficient to convict the owner of the premises when the government offered evidence that the truck was not his, that he knew nothing about a truck being there, and if one was there he had no keys for it, and further the government later offered testimony that the liquor and truck was not that of the defendant, Glenn Johnson, Sr., but some other person.

4.

Is the evidence obtained by reason of the search of the defendant's home in the night time admissable in evidence when it appears that the Marshal was armed with an arrest warrant for a person other than the owner of the curtilage,

and when it appears from the evidence that the Marshal stationed two agents of the Alcohol Tax Unit in the road near the home to watch the home while he, with other officers, searched another home, and upon his return to the premises found that the officers stationed near the home had entered the premises of the defendant and had arrested at least one person other than the owner and had peered into the home of the defendant prior to the return of the Marshal, and upon his return with the process immediately arrested the owner of the home and handcuffed him and proceeded to search the home of the defendant, and having found the contraband desisted from further search of the defendant's home.

STATUTES INVOLVED

Title 26 USCA Section 2803(a):

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. - - -"

Title 26 USCA Section 2913:

> "Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by

law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years."

STATEMENT

Respondent, Robert Glenn Johnson, Sr. was convicted on a three count indictment and the other respondents were convicted on a three count indictment for the same offense, which was Title 26 USCA 2803 and 2913. The only evidence against Glenn Johnson, Sr. was that procured by search of the truck. Glenn Johnson, Sr. was sentenced to imprisonment for 18 months and to pay a fine of $1250; defendant, L. P. Johnson, was sentenced to 18 months imprisonment and a fine of $2500, Ike Welborn and James Parks were each sentenced to imprisonment for 18 months.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding the search and seizure of the meat truck together with the 20 cases of nontax paid liquor lawful as to Glenn Johnson, Sr.

2. In holding that there was sufficient evidence to warrant a conviction of Glenn Johnson, Sr.

3. In holding that the search of the premises of L. P. Johnson was lawful.

4. In holding that the evidence against Ike Welborn and James Parks was sufficient.

5. In failing to grant a re-hearing in the case upon the discovery that no verdict was entered in the record.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals for the Fourth Circuit in their decision in this case failed to recognize the distinguishing difference in *Brinegar* v. *United States,* 338 U.S. 160 and *Carroll* v. *United States,* 267 U.S. 132, and the line of reasoning therein. The basis for the holding in these and similar cases is because of the movability of the vehicle and the possibility of its escape before obtaining a search warrant, and for that reason the officers were given the right to search on probable cause. All these cases relate to searches out on the open highway.

The case of *Hart* v. *United States* 162 Fed 2nd 74, decided May 21, 1947, we think makes the distinguishing difference therein, and the holdings of the Fourth Circuit in the instant case denies to the defendant, Glenn Johnson, Sr. the same privileges and guaranties as those given to citizens of the Tenth Circuit and the holdings in the instant case are in conflict therewith.

The Circuit Court relied on the recent decision of the Supreme Court in *United States* v. *Rabinowitz,* 339 U. S. 56, in which decision this court holds, in its opinion of the instant case, "But to the extent that such cases stress the practicability of obtaining a search warrant prior to the search, they have been supplanted by the recent decision of the Supreme Court of the United States in *United States* v. *Rabinowitz,* 339 U.S. 56". After a careful study of the Rabinowitz case we believe that the decision by the Supreme Court in that case, holding the search legal, was based upon the theory that the search of the one room office of the de-

fendant was incident to his arrest therein, and the court did not intend to say that this case did away with the constitutional guaranties of the 4th and 5th Amendments and the requirements for a search warrant in cases involving the search of a person's home, buildings, or vehicles within the curtilage, and did not intend to render the opinion in the case of *United States* v. *Trupiano,* 334 U.S. 699, a nullity where the facts and circumstances were similar.

As we interpret the case of *Baxter* v. *United States* 188 Fed 2nd 119, decided March 19, 1951, the holdings of the Fourth Circuit conflict with the holdings of the Sixth Circuit and deny to all the defendants in the instant case the same civil liberties and protection which are granted to the citizens of the Sixth Circuit. The Sixth Circuit in the Baxter case held that the evidence obtained by the officers standing behind a fence, observing the truck coming to the house and the occupants there loading nontaxpaid whiskey into the truck, entered the premises and arrested the defendants and seized the contraband, should not be admitted in evidence. The Rabinovitz case to us seems to be in line with the case of *United States* v. *Lefkowitz,* 285 U. S. 452 and other cases as to the power of officers to search the premises occupied by the defendant as incident to his lawful arrest and in no way in our opinion relates to the circumstances in the *Brinegar, Carrol* and *Trupiano* cases. The Trupiano case is a search of premises similar to the instant case, and the vehicle searched in instant case was not searched as incident to a lawful arrest, nor was there any reason to justify the immediate search of said vehicle because of its movability or possibility of it being removed from the officers prior to obtaining a search warrant. If they are to be permitted to search it on the grounds, as the officer testified, that they were looking for nontaxpiad liquor, the proper procedure under the laws would have been to

have submitted the information which Investigator Nicholson had to the United States Commissioner at Wilkesboro, some 15 miles away, and let the commissioner determine by judicial opinion as to whether his information constituted probable cause for the search of the vehicle.

As to the search of the vehicle as incident to a lawful arrest there can be no contention that a lawful arrest was made on the premises in the instant case on this night. It being conceded that the defendant, Glenn Johnson, Sr. was not arrested after the discovery of the contraband, but was arrested the next day. Further to this the appellant says that the evidence discloses that the Marshal never at any time went to search the truck himself or that any authority was communicated to the officer Nicholson to break the lock on the truck for the purpose of looking for the person for whom the officer had the process. There is no evidence in the record that the Marshal ever had any information that the fugitive would be concealed in a truck.

The further fact that it was apparent from an examination of the truck that a person could not be concealed in the truck, it being locked from the outside and upon opening the same it was found to be apparently an airtight truck, and that there was every indication from the outside that the same was an airtight meat truck.

As to the question of the search of L. P. Johnson's home the basis for the illegality of the search was the entrance into the curtilage by the two officers, Velich and Eckard, contrary to the instructions of the Marshal, the officers having testified that they heard tubs and other paraphernalia being moved around in the garage and smelled the odor of whiskey emanating from the house. That they then entered the premises and Velich arrested a Pardue boy when, so far as he or anyone else knew, no crime was being com-

mitted in his presence; the other officer, Eckard, being behind the house and close enough to the house to see the clock on the wall and thereby fixing the time of night in which he entered the premises of L. P. Johnson; the Marshal coming to the premises later after Pardue had been arrested by Velich with a warrant for one Bill Pardue after he had searched the home of Glenn Johnson, Sr. and immediately upon arriving at the front door of the home where L. P. Johnson, the owner, was standing and advising him that he had a warrant for the arrest of Bill Pardue and Johnson telling the Marshal he was not there and that he could not search, he was immediately arrested and handcuffed and the search of the house was begun and the defendant, L. P. Johnson, was not permitted to go back in his house before the officers and advise his wife, who at that time was in an advanced state of pregnancy, about the search. If these searches are to be sustained as lawful then the civil liberties and the guaranties of the 4th and 5th Amendments to the United States Constitution mean nothing to a householder and the old axiom that "a man's home is his castle" is nothing but sounding brass and tinkling symbols.

It was in evidence by the United States Marshal that he had information that one Bill Pardue was staying in the home of the Johnsons of Ingle Hollow. It was further in evidence that at least two other Johnson families lived on the same road in the Ingle Hollow community. Can a Marshall get general information that the fugitive for whom he is supposedly searching invade the privacy of the home of every person in the community by that name and therein search and seize with impunity and still give any meaning to the guaranties from unreasonable search and seizure.

Ike Welborn was arrested in the basement of the home where no contraband was found. James Parks was arrested

outside of the home and as he walked around the back of the house.

It was discovered in the course of the argument in the Circuit Court that no findings of guilt by the court had been entered and upon being informed by counsel for the defendant that they found no written record of guilt of the defendants the court inquired if counsel wanted to waive this for the defendants or if they wanted to trifle with the court. Whereupon counsel agreed to waive such finding in the record. Counsel now take the position that even though they undertook to waive it in good faith they had no authority to waive it in the absence of the defendants and that it was essential that the same should appear in the record before the court could enter a judgment against these defendants.

In the instant case as in the Trupiano case the property was bulky and not of the type that could have been removed before procurement of a warrant for the search. In the Rabinowitz case the stamps could easily have been removed the very moment defendant suspected the authorities were after him.

Further if the officers were of the opinion that there was contraband in the truck at the home of Glenn Johnson, Sr. or in the home of L. P. Johnson they were in sufficient numbers to have left one of their group at either of said premises to see that no disposition was made of anything and could have gone to the commissioner and obtained warrants if probable cause they had.

The petitioners believe that the ruling of the District Court and the Circuit Court of Appeals as to the sufficiency of the evidence to convict fails to recognize the laws as laid down in the case of *Powell* v. *State of Alabama,* 287 U.S. 45 and *United States* v. *Fleischman* 339 U.S. 349.

In view of the state of the law in this court on search and seizures and the difference in the rulings in the Tenth and Sixth Circuits and in the Fourth Circuit, as we understand it to be, the instant case manifestly presents an important question which can only be resolved by this court.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

KYLE HAYES
Counsel for Petitioners
Hayes Building
North Wilkesboro, N. C.

Counsel on Brief for Petitioners:
CLYDE HAYES
EUGENE TRIVETTE
WM. G. MITCHELL
Northwestern Bank Building
North Wilkesboro, N. C.